No. 12,093

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHANNES FREDERICK BECHTEL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTIONS.

This is an appeal by the appellant, Johannes Frederick Bechtel, a naturalized citizen of the United States residing in Alameda County, California, from a final judgment (R. 62) of the U. S. District Court for the Northern District of California, Southern Division, entered against him in a suit in equity cancelling a final naturalization judgment of the Superior Court of California in and for the County of Alameda entered on February 23, 1934, upon the ground that it had been procured through the instrumentality of intrinsic fraud.

The bill in equity was filed under the asserted authority of Title 8 USCA, Sec. 738, on Dec. 22, 1942. (R. 1.) The final judgment of the court below cancelling the state Court's judgment naturalizing him was entered on March 31, 1944 (R. 62), based upon findings against the Bund (R. 41) and against the appellant. (R. 55.) His motion for a new trial (R. 69) was ordered denied on April 7, 1944. (R. 72-73.) On July 26, 1944, the appellant filed his notice of appeal from that judgment to this Court on questions of law and of fact (R. 74), together with his bond for costs on appeal. (R. 75.) The opinion of the Court below is reported in 54 F. S. 63, 81.

The plaintiff asserted the District Court below had jurisdiction to entertain the bill by virtue of the provisions of Title 8 USCA, Sec. 738, a fact disputed by appellant below and here. What jurisdiction, if any that Court had, arose thereunder or under Title 28 USCA, Sec. 41 (1), now Title 28 USCA, Secs. 1331 and 1345.

This Court has jurisdiction on appeal to review the judgment of the Court below by virtue of the provisions of Title 28 USCA, Sec. 225 (a) First, now Title 28 USCA, Sec. 1291.

The pleadings necessary to show the existence of the jurisdictions are the complaint (R. 1) : the answer (R. 4) and supplement to answer (R. 11) : motion for judgment on the pleadings (R. 22) and for hearing special defenses (R. 26) : findings (R. 41) and (R. 55) : judgment (R. 62) : and notice of appeal. (R. 74.)

STATUTES THE VALIDITY AND APPLICATION OF WHICH ARE INVOLVED.

1. Title 8 USCA, Sec. 738 (a), enacted December 14, 1940, which provides as follows:

> (2) "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

2. Title 8 USCA, Sec. 738 (e), which provides, as follows:

> (e) "When a person shall be convicted under this chapter of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication."

3. Title 8 USCA, Sec. 738(g), which provides, as follows:

> (g) "The provisions of this section shall apply not only to any naturalization granted and to cer-

tificates of naturalization and citizenship issued under the provisions of this chapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court."

Note:

Sec. 738 (e) is part of the Nationality Act of 1940 and was derived, in part, from 8 USCA, Sec. 405, which related to civil cancellation of certificates, and, in part, from 8 USCA, Sec. 414, which related to the crime of procuring naturalization certificates. Both those prior laws were repealed when the Nationality Act of 1940 was enacted. Inasmuch as Sec. 738 (e) refers to criminal convictions the section seems to have no application to the instant case for, were it so construed, it would be void as an ex post facto or retroactive law. Sec. 738 (g), was derived from the repealed 8 USCA, Sec. 405, and appears to be void for uncertainty as to whether it applies to civil or criminal cases and also for being an ex post facto or retroactive law.

QUESTIONS INVOLVED.

1. Can a final naturalization judgment rendered by a state Court of competent jurisdiction be nullified by an attack launched in a federal Court?

2. Can a denaturalization judgment be justified by the imputation of a mental reservation of foreign allegiance at the time of naturalization, *nunc pro*

tunc, when the mental reservation rests upon evidence which failed to meet the requirements of the "clear, unequivocal and convincing evidence" rule?

STATEMENT OF THE CASE.

(The Consolidated Bund Trial)

The plaintiff produced a series of witnesses before the trial Court to testify to the limited issue that the German-American Bund and its precursor and affiliate organizations were subversive in design and character. (That matter, however, had no bearing on the issues involved insofar as the individual defendants were concerned.) It succeeded in demonstrating only that the national leaders of those organizations in the East who were admitted subversive characters may have intended and designed the West Coast "locals" for ultimate conversion into quasi-subversive organizations. However, these purposes were concealed from all but the "leaders". (Bund R. 159.)

In consequence, the associative "units" or "locals" spread throughout the country were in an amorphous formative stage and constituted nothing more than Bund "innocents clubs". Through these social clubs the national leaders drew unsuspecting immigrants and deludable citizens into their orbit for the purpose of exploiting them financially for the private profit of the leadership. The procedure was to stupefy their prospective victims by harangues in guttural German and English on economic topics while they enjoyed

the exhilarating effects of nothing stronger than locally manufactured beer, a modern form of gymnastics which passes for dancing and the doubtful pleasure of viewing travelogues depicting current economic events in Germany. In this manner the leadership hoped to induce them into a belief the economic policies of the then rising new Germany, under the tutelage of Corporal Hitler, was accomplishing miracles for the German proletariat and peasantry in particular and the German bourgeoisie in general.

Perhaps, through the medium of ceaseless crude propaganda to be dinned into their ears at a later date, the Bund leadership may have hoped to wean their victims from their pristine state of political ignorance to an acceptance of the political philosophy of Nazism to which these subversive national "leaders" long had been committed. However, all that they did insofar as West Coast units were concerned was to emphasize the evils of what they were boorish enough to believe was communistic Jewry which they asserted was exemplified by the overlords of the Soviet Union. Paradoxically, the communist Soviet Union, under the tutelage of Stalin, the Kha Khan of Tartary whose geo-political horizon encompasses the world has been quite as anti-semitic as the barbarian Hitler whose horizon was limited to Mittel Europa. It has liquidated countless innocent Jews under the plea they were counter-revolutionaries, running dogs of capitalism, Trotskyite enemies or simply Muzhik betrayers of the new "Fatherland"

that long had been known as "Mother Russia". Whether the Bund leadership expected to persuade their victims into becoming half-baked or full-fledged Nazis in course of time is a matter for speculation. No such conclusion can be drawn from the record herein. There is no evidence in the record of the Bund herein that the aims of its leaders were to overthrow the U. S. government by force or violence or to capture political power here by hook or crook or that the local organizations advocated any such things. Their objective was the development and promotion of a body of organized public opinion in the U. S., favorable to the economic aspirations of the New Germany, while they played the financial role of parasites to the members of the organizations who constituted the gullible hosts. In 1938 the national bund-leader Fritz Kuhn was tried and convicted on a charge of embezzling Bund funds.

We do not penalize the Stalinites and their dupes who hover within the lunatic fringe for their opinions, activities and associations by seeking to denaturalize them. This oppressive procedure has been reserved by our good Attorneys General for the exclusive detriment of former German nationals. When, long after having been admitted to citizenship with our blessings, they have committed the unforgivable crime of entertaining opinions and discussing views not shared by the majority or have been deceived by such organizations as the Bund we institute proceedings to decitizenize them. In this manner they are punished for possessing unstable minds, that is, minds that

have shed opinions with the elapse of time and acquired new ones with the shifting of political, social and economic conditions or because they have had the misfortune to associate with persons or join organizations we deem suspect. The method of punishment is through tardily imputing to them a mental reservation of foreign allegiance at the time of naturalization, *ab initio,* by unreliable proof of opinions, conduct and associations long since then.

To this end the plaintiff, alias the Attorney General, under the misnomer of "The United States of America", a device utilized with historic legal sanction to induce the populace into a belief the nation is the interested plaintiff, searched low for witnesses to aid its case. It paraded before the judicial servant of the Republic at the trial below the most respectable witnesses it could find and select for that purpose. Out of the shadow of the prison and the gutter it brought a number of subversive national "leaders" of the Bund to degrade and incriminate themselves with glib shamelessness. One of them was a self-confessed degenerate and ex-convict. (Bund R. 297.) Another, following a pattern laid down in like cases, disgraced the stand with a sanctimonious shroud of mystery by insisting on the privilege of testifying under the fictitious name of "John Doe". These then are the "good witnesses and true" the plaintiff produced before the trial Court to testify concerning the Bund and so, by a process of induction, against insignificant, beer-drinking, harmless members of the little social club "locals" who became dupes for the final time. No

attempt had been made by the government to denaturalize or punish these thoroughly disreputable witnesses upon whom the mantle of citizenship still rests securely with governmental approval.

It is a pity that we participate in the outrage of denaturalization. We do so because we are taught not to question or criticize what passes for "governmental policy" but to do blindly what is bidden us. Thus does prosecution become the tool of persecution. The practice of denaturalization lies quiescent in time of peace but springs into operation in time of war. Although it serves as a medium of government publicity to inflame public passion against naturalized citizens who were born in a country with which we are at war, it is a double-edged sword for it also teaches scrutinizing minds that government itself has more than a spark of savagery in its very nature and is all too willing to sacrifice personal rights we have been accustomed to regard as precious.

(Appellant's Individual Trial)

The appellant, by occupation a gardner, filed his declaration to become a citizen on April 29, 1927. (R. 93, 106, Exh. 1). He filed his petition for citizenship in the Superior Court of California, in and for Alameda County, on November 22, 1933. (R. 93, Exh. 1.) It was granted in an adverse proceeding before that Court on February 23, 1934. (R. 93, Exh. 1; R. 345-358.) The appellant appeared in that Court and was examined in open Court by the Superior Court judge and by the naturalization examiner who

represented the federal government. (See testimony of deputy clerk Kingston, R. 345 to 359, explaining the matter in detail.) Thereupon a final judgment granting the appellant citizenship was entered in the proceeding and recorded in Vol. 74 at page 112 of Petitions for Naturalization in the Alameda County Clerk's office. (R. 345.) (R. 385-389.) This was a formal final judgment of that Court.

The appellant was born in Germany on May 24, 1900. (R. 105.) He graduated from grammar school and had a little occupational training as a gardener. (R. 105, 360.) He served as a private in the German Army for five months in World War I. (R. 105, 361.) He became a member of the Social Democratic Party in Germany while still a minor, following the conclusion of that war. (R. 361, 394.) Because of his sensitiveness against violence he saw displayed in the Kapp Putsch he left Germany when he was 20 years of age and went to Sweden. (R. 361.) Five years later, in 1925, he migrated to the United States (R. 362, 365) and finally made his home in Oakland. (R. 363.) He was married in 1928 (R. 172) and is the father of a daughter who was 13 years of age at the time of the trial. (R. 364.) He acquired a home in Oakland, is a taxpayer and voter. He attended evening schools. (R. 367.) He is a Lutheran. (R. 367.) He has no police record. (R. 367-8.) He joined a singing society (R. 368) and the fraternal orders, Herman Sons and the Redmen. (R. 369.)

While his wife was on vacation in September or October, 1934, he received an invitation in the mail

(R. 170) to attend a social to be held in the Pioneer House, Oakland, given by the Friends of New Germany. He attended. Because it was opposed to communism and the naturalization judge had required him to give his word to defend the Constitution against communism which was devoted to overthrowing the government by force and violence and in destroying religion and all private property (R. 399) he later signed a membership application card. (R. 370.) He had been informed and believed it was a patriotic organization (R. 400) opposed to "Communism" (R. 374, 400, 148) and also to the importation of "National Socialism" to this country. (R. 374.) It celebrated Washington's birthday and its members sang the Star Spangled Banner. (R. 374-5.) The members never heiled Hitler. (R. 374.) It was dissolved in 1935 or 1936. (R. 107.)

In 1936 (R. 372) he became a member of the German American Bund and paid 75¢ dues per month. (R. 377.) On occasions he wore a white shirt, black belt and an arm band bearing a swastika and a chauffeur's cap which later was replaced by an overseas cap. (R. 378.) He acted as an usher at a number of the Oakland local's socials and did janitor work for the organization. (R. 378.) The members celebrated Washington's birthday and other national holidays. (R. 380.) He heard that the German consul and the German government were opposed to the Bund. (R. 381.) He did not there or elsewhere hear that the Bund advocated a "blood theory," the "fuehrer principle," the principles of national socialism or anti-

semitism. (R. 172, 381-2.) He did learn that it was opposed to propaganda against the new Germany, (R. 382), and heard "very much" discussion of the economic policies of Germany under the Hitler regime. (R. 382.)

Jessen first met appellant in August 1937 at a dance to which he invited appellant. (R. 97-99) (90.) The Concord High School Band furnished the music. (R. 391.) Hein and Jessen tried to sign up persons as members of a new local but succeeded in signing up only three persons. (R. 98.) The appellant knew nothing of their activities. (R. 391.) The appellant never read Mein Kampf (R. 147) and didn't originally know what the word Aryan meant. (R. 116.) He is not anti-Semitic. His two physicians were Jewish. (R. 412-3.) He personally recommended a Jewish friend, Bert Golden, for membership in the Friends of New Germany who thereafter attended. (R. 117, 178.)

When he became a citizen in 1934 he fully and completely renounced any and all foreign allegiance to Germany without any mental reservation. (R. 120-1.) During his subsequent membership in the Oakland local of the Friends of New Germany and the Bund he studied the U. S. Constitution. He originally saw nothing inconsistent with their activities, as observed and known to him, that was incompatible with allegiance to the U. S. (R. 120-1.) He neither knew nor had any reason to know that the Friends of New Germany, the Bund, the Oakland local or the officers of these were "crooked" until he viewed the docu-

mentary evidence concerning the Bund at the pre-trial in this proceeding. (R. 401.) He had been deceived into believing these were patriotic American societies. (R. 400.) The Bund record shows that the national leaders practiced this deception upon innocent persons who became mere members. He was at all times ready, willing and able to bear arms against Germany and the Axis nations. (R. 121-3.) In 1938 he wrote an essay to Town Hall expressing his belief and faith in the U. S. Constitution and his ideas concerning our form of government. (Exh. B, R. 184-188.) Although this essay is not couched in impeccable English it would do credit to any immigrant or citizen.

His interest in Germany under the Hitler regime was limited to its general economic recovery program, the rebuilding of Germany and its solution of its unemployment problems. (R. 128-130.) He believed that Germany under a dictatorship could rebuild and solve its economic problems quicker than in a democracy but not as efficiently as in a democracy. (R. 131.) He was opposed to Germany's invasion of Austria and to the use of force against any country. (R. 417.)

The Friends of New Germany honored the American and German flags equally at its celebrations (R. 170), each being put in its proper place. (R. 171.) The appellant personally believed the U. S. flag should be given a preferred place of display. (R. 163, 416.) He never attended any April 20th celebration of Hitler's birthday (R. 176) or any celebration at which Hitler was honored. (R. 404.) He held a private party in his home on his wedding anniversary on

April 24, 1938 (R. 176, 389), at which the American and Swedish flags were displayed and a crepe swastika was on the ceiling. (R. 177, 389.) In 1938, he was present at a Bund picnic held in Dublin Canyon where a swastika was burned. (R. 181.) He watched over this fire to prevent it from spreading. (R. 183.) In the first week of 1939 (R. 112, 145, 382), because of a growing dissatisfaction with Bund policies (R. 404) and as a result of personal private quarrels with Hein whom he and others had excluded from a private orchestra (R. 382), and over Hein's speeches against Jews (R. 383) and because Hein was trying to run the local Bund like a dictator, (R. 112-3, 384, 397), he resigned his membership. He was never an officer, leader or organizer of either organization. He was not a propagandist or distributor of literature. He was not a speaker for either. He was not anti-semitic. He did nothing to promote any subversive objective.

The gist of the plaintiff's case against the appellant is as follows: (1) he was a member of the Friends of New Germany from Sept. 1934, until it dissolved in 1935 or 1936; (2) he was a member of the German American Bund from 1936 to 1939; (3) on occasions he wore a black belt, white shirt, arm band and first a chauffeur's cap and later an overseas cap at a few meetings of those organizations; (4) on one wedding anniversary in 1938 he had a crepe swastika on his ceiling; (5) he was excluded from the West Coast by a military commander in 1942 and this order was revoked; (6) he watched over a fire in Dublin Canyon at a Bund picnic which was open to the public; (7)

he was opposed to the principles of Communism; (8) he subscribed to the Wekruf Beobacher for one year in 1938 (R. 145) to read about Fritz Kuhn who was tried on charges of embezzling Bund funds; (9) a witness testified he once carried a swastika flag through the foyer of the Pioneer House into the Bund meeting room; (10) the members sang the Star Spangled Banner and the anti-communist Horst Wessel song. (R. 148.)

The plaintiff's witnesses testified as follows:

Eldon J. Edwords, a tavern keeper, testified the appellant once stated in 1937 or 1938 the Jews were the cause of trouble in Germany. (R. 154.) His entire testimony was immaterial and hopelessly incredible and the trial judge so appears to have regarded it.

Mrs. Jeanne Eloise Atkins saw appellant in 1936-1938 wearing a Sam Browne belt, swastika arm band, white shirt and black tie at the Pioneer House; (she had been unable to identify the appellant in court (R. 190); at a Bund social held in the ballroom (R. 193) she once saw him carry the swastika flag across the foyer into the social hall. (R. 196.)

Rudolf Joseph Schall had known appellant since 1931 or 1933 (R. 199); appellant told him, at an unspecified time, that conditions in Germany were good according to a letter he had received from Germany. (R. 201.)

Robert Bach testified that the appellant in 1937, 1938, or 1939, stated that working conditions in Germany under Hitler were better than before (R. 217)

and that Jews who were being persecuted there should be given a country of their own where they could have their own government and be free from persecution (R. 217a) and that on appellant's tenth wedding anniversary in 1938 a swastika decoration was on the ceiling. (R. 217.)

Karl W. Boller testified that in 1938 at his wedding anniversary the appellant stated that something Boller had read in a newspaper was Jewish propaganda (R. 225); that appellant never discussed National Socialism or the political program of the Nazis. (R. 239.) This witness signed a statement prepared by an F. B. I. agent stating his opinion the appellant approved Hitler's program in Germany but that he did not advocate such a government for the U. S. (R. 227-229.) This opinion evidence was objected to (R. 218-235) and was improperly admitted without the plaintiff laying the foundation for impeachment of the witness on the ground of surprise. Cross-examination proved that the witness's statement referred to appellant's approval of the economic policies of Germany. (R. 238.)

Guenther R. Reinecke testified that in 1938 while attending the appellant's tenth anniversary celebration he saw a paper mache swastika on the ceiling (R. 249); and that the appellant approved of the German building program. (R. 252.)

Henry Koenig testified that the appellant stated to him at an unspecified time that conditions in Germany were a "little better" after Hitler assumed power. (R. 256.) He signed a statement prepared by an

F. B. I. agent stating that the appellant, in 1935 or 1936, talked about conditions in Germany and complained of poor conditions in the U. S. (R. 261); and on cross-examination testified that appellant's approval of Germany was restricted to approval of her solution of her internal building and employment program (R. 263) and that he never told the F. B. I. agent things would be better if a new order was here. (R. 263.)

Albert W. Kruse testified that in 1933 or 1934 (1938?) the appellant, comparing the condition of the common people stated they appeared to be better off economically in Germany than here during the depression (R. 269-270); that appellant offered him German language papers to read (R. 271); that appellant, referring to a newspaper article written against Germany, said "There it goes against the Jews" (R. 271); that in 1939 appellant said he would like to go back to Germany, but whether for a visit or permanently, the witness didn't recall. (R. 273.)

Arthur Cobbledick testified that the appellant told him the Nazis, at an unspecified time, prior to the war, were rather successful in meeting their unemployment problems (R. 275) and that the appellant felt that much of the disturbance or problems in Germany were to be blamed on the Jews. (R. 276.)

Mrs. Edna Bell Holman testified that in 1938 or 1939 the appellant believed it was right for the Jews in Germany to be sent to Palestine to make use of that country (R. 280); that the appellant wanted to take a trip to Germany to see how conditions there

were (R. 282); in 1939 or 1940 the appellant said that Jews oppressed by Hitler's regime should be permitted to leave Germany and establish a national homeland of their own (R. 287-288) and that he anticipated trouble involving the Jewish people in the United States (R. 288); that the appellant is "very truthful." (R. 291.)

The Defense Witnesses testified as follows:

Dr. Daniel Crosby testified that he had known appellant for 10 years (R. 296); and that the appellant has a reputation for dependability (R. 299), is truthful (R. 299), stable and reliable. (R. 299.)

Phil S. Gibson, Chief Justice of California, testified that he had known appellant since 1939 (R. 303); that appellant has a good reputation for truth and veracity (R. 304), is honest and reliable (R. 305), was proud of this country and his American citizenship (R. 305); the appellant had informed him that he had thought that Hitler and his followers would do something for the poor people in Germany and represent the common people of Germany against the military clique and oppose the spread of communism in Germany, but that he was disillusioned when the Russo-German pact was entered into (R. 306-7); that appellant stated the U. S. should provide a home for persecuted European Jews in Alaska (R. 307); that appellant told him he had been informed by the judge who naturalized him that it was one of his duties to fight communism and the spread of communism in

this country (R. 307); that before we were drawn into the war appellant was opposed to war anywhere (R. 307) and that in his opinion, appellant is a loyal citizen of the United States. (R. 308.)

Mrs. Lou Mitchell Young testified that she had known appellant since 1933 (R. 312); that appellant has a very fine reputation for truth and veracity (R. 313) and is a good worker; in 1938 or 1939, he told her he was opposed to communism (R. 313); that he had written an essay on the Constitution (R. 314, Exh. B), that he expressed the same sentiments regarding it to her, he believed in it and upheld it and was sincere (R. 314); that he was not opposed to Jews but to communists and Jews who were communists (R. 315); that he stated the oppressed Jews should be given a national homeland (R. 316); that he is a loyal citizen (R. 316); that she went to the F. B. I. and told them that appellant was talking perhaps too much about "Communism and Communistic Jews" and asked that Bureau to talk to him to protect him from getting into trouble in the event the U. S. entered the war (R. 320); that appellant had joined the Bund "Because he thought it was a 'social organization'" (R. 321) but had left it in 1938; that he is "honest, upright, straight-forward, and we trusted him implicitly." R. 321.)

H. E. Rohrbach testified that he had known appellant since 1928 or 1933 (R. 324); the appellant's reputation for truth and veracity is very good (R. 325); he is honest, reliable and law-abiding (R. 326), and

conducted himself as a good American citizen. (R. 326).

Edward N. Long testified that he had known appellant since 1938 (R. 333), the appellant was an efficient worker and very honest and dependable (R. 333); had stated he was glad to be a citizen, that he is trustworthy (R. 334) and was "always law-abiding." (R. 335.) This witness was a witness for appellant at his naturalization hearing. (R. 339.)

Ernest Hugo Herschell testified that he had known appellant since 1928 (R. 336); that he and his wife were witnesses for appellant at the time of his naturalization hearing in 1934. (R. 336).

Deputy County Clerk John Joseph Kingston testified that official records of the Superior Court show appellant, by adverse proceeding, was granted his petition for citizenship at a hearing on the petition. (R. 345-358.)

The contentions that the Court below had no jurisdiction over the cause, that the complaint in equity failed to state facts sufficient to constitute a cause of action and that the cause was *res judicata* and barred by laches were raised by the answer (R. 4) and supplemental answer (11), motion for judgment on the pleadings (R. 22), motion for hearing special defenses (R. 26) and motions for dismissal interposed at the opening and during the Bund trial (Bund R. 3, 24) and appellant's individual trial (R. 264), at the close of the plaintiff's evidence on Bund trial (R. 797) and appellant's individual trial (R. 359) and on the mo-

tion for a new trial (R. 69), each and all of which motions were denied. The insufficiency of the evidence to justify the judgment and the contention it was contrary to the evidence and law were raised on the motion for a new trial (R. 69) which was denied. (R. 72-3.)

SPECIFICATION OF ERRORS RELIED UPON.

The trial Court below erred in the following particulars:

1. In denying appellant's motion (R. 22) for judgment on the pleadings. (R. 294-6; 359) and (Bund R. 3, 24, 797).

2. In denying appellant's motion (R. 26) for dismissal of the cause on the special defenses contained in answer and in supplement thereto and for insufficiency of the evidence to establish a prima facie case. (R. 294-296, 359.)

3. In adopting plaintiff's findings of fact and conclusions of law.

4. In refusing to adopt appellant's proposed amendments (R. 39) to plaintiff's proposed findings of fact and conclusions of law on issues involved in consolidated Bund trial and in adopting those of plaintiff. (R. 41.)

5. In refusing to adopt appellant's proposed amendments (R. 65) to plaintiff's findings in his separate trial and in adopting those of plaintiff. (R. 55.)

6. In denying appellant's motion (R. 69) for a new trial. (R. 72-73.)

7. The complaint fails to state facts sufficient to constitute a cause of action against the appellant.

8. The Court below had no jurisdiction over the cause except to dismiss the complaint for want of jurisdiction.

9. The evidence is insufficient to justify the judgment.

10. The judgment is contrary to the evidence.

11. The judgment is contrary to law.

12. The trial Court erred in the reception and rejection of evidence, over appellant's objections.

13. The trial Court erred in denying appellant's motion for judgment on the pleadings and for dismissal of the complaint made at the opening of the consolidated Bund trial (Bund R. 3, 24) at the conclusion of plaintiff's evidence thereon and at the conclusion of the defense thereon. (Bund R. 797.)

14. The trial Court erred in denying appellant's motion for judgment on the pleadings and for dismissal of the complaint made at the conclusion of the plaintiff's evidence thereon (R. 294, 359) and at the conclusion of the defense's evidence thereon. (R. 359.)

SPECIFICATION OF ERRORS IN THE ADMISSION AND REJECTION OF EVIDENCE.

1. The trial Court erred in permitting the appellant to be examined as an adverse witness over his objection that the plaintiff's interrogatories failed to specify he was to be called and the testimony expected to be elicited from him. (R. 105.)

2. The trial Court erred in permitting the appellant to be examined, over his objection, as to statements made by him to an army board which the government obtained from him upon a promise to keep them confidential. (R. 163-4.)

3. The trial Court erred in admitting evidence, over appellant's objection, to privileged communications between appellant and his wife, to the effect that she did not wish him to have anything to do with the Bund because other friends wanted nothing to do with the Bund. (R. 172-3.)

4. The trial Court erred in permitting plaintiff's witness, Mrs. Atkins, over appellant's objection, to testify that in 1938, four years after his naturalization, she saw him carry a swastika flag from the foyer to the ballroom of the Pioneer House. (R. 189-190.)

5. The trial Court erred in permitting the plaintiff's witnesses Schall, Bach, Boller, Reinecke, Koenig, Kruse, Cobbledick and Holman to testify to activities and expressions of the appellant since the time of his naturalization in 1934, over his running objections thereto that such testimony was too remote to bear on the issues involved and was immaterial. (R. 200-1.)

6. The trial Court erred in permitting the plaintiff's counsel to examine and impeach the plaintiff's own witnesses Schall (R. 202-209), Bach, Boller, Reinecke, Koenig and Holman (R. 218-223), over appellant's objections, as though they were hostile witnesses in the absence of laying a foundation of having been taken by surprise by them.

SPECIFICATION OF ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. Finding No. IV, R. 56, is erroneous in stating that the appellant assisted in the activities of the organizations such as marching and carrying the swastika banner.

There is no evidence in the record that the appellant marched at any time. One witness only testified that she saw him once carry the swastika flag across the foyer of the Pioneer House in Oakland into the social hall (R. 196) and this witness originally was unable to identify the appellant in Court. (R. 190.)

2. Finding No. VI, R. 56, is erroneous in declaring that the appellant went with Gottfried Karl Hein, local bund leader, to Concord when the Concord unit was organized.

The evidence is conclusive that the appellant was invited to a dance at Concord and went there. (R. 391.) Hein and Jessen tried to form a unit there (R. 98) but this fact was not known to the appellant. (R. 391.)

3. Finding No. VIII, R. 57, is erroneous in stating that the appellant between 1934 and 1939 approved of Hitler's treatment of the Jews in Germany.

That finding is not only unsupported by the evidence but is contrary to the evidence.

4. Finding No. IX, R. 57, is erroneous in stating that the appellant on Dec. 14, 1942, stated to a U. S. Army Board that he honored the swastika flag equally with the American flag.

The evidence is undisputed that he stated to that board that the Friends of New Germany organization honored the American and German flags equally (R. 170) at its meetings, each flag being put in its proper place. (R. 171.) The evidence is uncontradicted that appellant personally believed the American flag always merited a preferred place of display. (R. 163, 416.)

5. Finding No. X, R. 57, is erroneous in stating the appellant knew and understood the leadership principle as enunciated and subscribed to by the leaders and members of the F.D.N.D. and G.A.B.

The evidence is indisputable that the leadership principle was not discussed in the presence of the appellant at the Oakland local which was in a mere formative stage. Neither there or elsewhere did the appellant hear any discussion of any such principle. (R. 172-381-2.)

6. Finding No. XIII, R. 58, is erroneous in stating that the appellant ceased attending meetings of the

G.A.B. solely because of personal disagreements with Gottfried Hein and not because of disagreement with the policies and ideologies of the G.A.B. itself.

The evidence is undisputed that the Oakland local was a Bund "innocents" club and that the national leaders concealed from mere local members what their subversive policies and ideologies were. There is no evidence that the appellant was informed of those policies and ideologies. The evidence is conclusive that appellant ceased attending meetings of the Bund in October, 1938, and resigned from the local in the first week of January, 1939, because of personal disagreements with Gottfried Hein over Hein's attempt to join their private orchestra (R. 382), over Hein's speeches in 1938 against Jews (R. 383), over Hein's method of conducting the Radio Hour program (R. 384), and because Hein was running the unit too much like a dictator and without consulting anyone (R. 112-3, 384, 397) and because of a growing dissatisfaction of Bund policies. (R. 404.)

7. Finding No. XIV, R. 58, declaring that at, from and since his naturalization appellant's allegiance has been to Germany and not to the United States and his attachment to National Socialism rather than the principles of the Constitution is wholly erroneous.

There is not an iota of evidence in the record that appellant's allegiance since his naturalization has been to Germany or that his attachment has been to National Socialism.

8. Finding No. XV, R. 59, that the appellant was acquainted with the National Socialist character and

connection of the Bund as set out in the Bund findings and that he was in sympathy and agreement therewith is wholly erroneous.

There is no evidence in the record of appellant's individual trial from which any such findings could be made.

9. Finding No. XVI, R. 59, is erroneous in its entirety in declaring the appellant's oaths and statements in his naturalization proceeding were false and that he retained at said time a mental reservation of allegiance to Germany and that he did not give true and complete allegiance to the United States.

There is no evidence in the record from which any portion of said finding fairly could be made. On the contrary, the evidence is conclusive that the appellant was not guilty of any intrinsic or extrinsic fraud and that he abjured allegiance to Germany and then and there and ever since then has given full and true allegiance to the United States.

10. Conclusion of Law No. 1, R. 60, is erroneous in declaring the Court below had jurisdiction of the subject matter of the action.

That Court acquired no jurisdiction to set aside the final judgment of the Superior Court of California naturalizing the appellant. The conclusion is contrary to law.

11. Conclusion of Law No. II, R. 60, declaring the certificate of naturalization granted appellant was illegally and fraudulently procured by him and should

be revoked, set aside and cancelled is erroneous in its entirety.

This finding is contrary to the evidence and to law.

SUMMARY OF ARGUMENT.

The federal district Court below lacked jurisdiction to entertain the bill in equity to set aside the final naturalization judgment of a California state Court of record and the issues being *res judicata* the bill failed to state a cause of action. The failure of the plaintiff therein to have filed the affidavit showing good cause for filing the bill also deprived that Court of jurisdiction over the cause. The judgment below is erroneous because it was based upon evidence which failed to meet the requirements of the "clear, unequivocal and convincing" evidence rule. After the entry of the judgment below the Supreme Court decided, *Baumgartner v. U. S.,* 322 U. S. 655, which is controlling on the evidentiary issue on this appeal and requires a reversal of the judgment below.

ARGUMENT.

I.

THE DISTRICT COURT LACKED JURISDICTION OVER THE CAUSE FOR NON-COMPLIANCE WITH STATUTORY CONDITION PRECEDENT.

The complaint is defective and should have been dismissed because the U. S. district attorney failed

to file an "affidavit showing good cause" for the filing thereof, as required by Title 8 USCA, Section 738(a), as a condition precedent to the institution of the suit. There seems to be a conflict of authority in the circuits on this point. In *U. S. v. Saloman* (CCA-5), 231 Fed. 928, 929, a denaturalization suit was dismissed on the ground the affidavit was a mandatory jurisdictional prerequisite to the bringing of such a suit. In *Schwinn v. U. S.* (CCA-9), 112 Fed. (2d) 74, 75, this Court expressed an opinion that such an affidavit was "not jurisdictional." We submit that the condition is a mandatory condition precedent to the bringing of such a suit. In enacting the statute Congress acted within its legislative sphere and intended it to be a condition precedent. It is not to be presumed that Congress did not know what it was doing when it enacted the provision or that it intended that it was to have no meaning whatever. We suggest that Congress intended the ordinary import of the words set forth in the statute and contend that for the Courts to ignore the condition is an unwarranted interference with the legislative field forbidden by Article I of the Constitution.

II.

THE DISTRICT COURT LACKED JURISDICTION OVER THE CAUSE AND THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION COGNIZABLE THEREIN.

Original jurisdiction to naturalize aliens is conferred upon *Federal District Courts* and also upon

State Courts of record by the Nationality Act of 1940 (8 USCA, Sec. 701) and formerly by 8 USCA, Sec. 357. A State Court does not function as a Federal Court or as an agency of a Federal Court in naturalization proceedings. *In re Fordiani,* 98 Conn. 435, 120 A. 338, 339, 3 *Corpus Juris Sec.* 842, Sec. 134. In naturalization proceedings commenced in State Courts the adjective or procedural law of the State governs and that of the Federal jurisdiction has no application. See *Tutun v. U. S.,* 270 U.S. 568, and see also, *In re Bogunovich,* 18 Cal. (2d) 160, where this is recognized. Obviously, a proceeding in a Federal Court to set aside a final judgment of a State Court would constitute an impermissible Federal interference with the sovereignty of the State. See, *U. S. v. Gleason,* 78 Fed. 396.

In California the rule long has been settled that a final judgment of a California State Court cannot be subjected to attack for *intrinsic* fraud. See *Pico v. Cohn,* 91 Cal. 129, establishing the California rule. A judgment of a California Court which has become finalized is conclusive against attack except for *extrinsic* fraud, as established in that case. In consequence, the Federal Government could not move in a California Court to attack the final naturalization judgment herein except for *extrinsic* fraud and even to conduct such an attack it would have to sue as a plaintiff in a California Superior Court. Obviously Congress is not empowered to interfere with the conclusiveness of State judgments rendered by State Courts in matters of which they have jurisdiction. The Fed-

eral Government was a party to the hearing of the appellant's petition for citizenship in 1934 in the Superior Court at Oakland. It was an interested party represented by the naturalization examiner. That proceeding was an adversary one. The Federal Government did not take an appeal from that judgment and, in consequence, it not only became final but conclusive on the appellant and also on the Federal Government. Nothing in Title 8 USCA, Sec. 738, is to be construed as an attempt on the part of Congress to confer upon Federal Courts the power to nullify final naturalization judgments of State Courts of record. It has no power so to do. The State of California has not delegated any such authority to the United States and the 9th and 10th Amendments reserve such power to the States. No Court in the land appears to have declared that final naturalization judgments of State Courts can be set aside by attacks thereon instituted in a Federal forum.

The most that 8 USCA, Sec. 738 can be construed to authorize is (1) to enable the Federal Government to institute suits in Federal Courts to set aside Federal Court naturalization judgments either for intrinsic or extrinsic fraud and (2) to institute suits in State Courts, if not contrary to State law, to set aside State naturalization judgments if the State law authorizes attacks thereon either for intrinsic or extrinsic fraud. California State law, as decided by the Supreme Court of California, the highest judicial tribunal of the State, precludes attacks on its final judgments for intrinsic fraud but allows attacks for extrinsic fraud.

However, the complaint herein alleges a cause of action for intrinsic fraud, that is to say, it alleges the State naturalization judgment was obtained by perjury. In consequence, if it had been filed in a California Superior Court it would not have stated a cause of action. Inasmuch as it was filed in the U. S. District Court it not only fails to state a cause of action but exhibits an apparent want of jurisdiction in that Court over the cause on its very face.

III.

THE JUDGMENT IS ERRONEOUS BECAUSE IT IS BASED UPON EVIDENCE FAILING TO SATISFY THE CLEAR AND CONVINCING EVIDENCE RULE.

In direct attacks upon naturalization judgments brought by the United States for the jurisdictional reasons specified in 8 USCA, Sec. 738, Federal Courts may invalidate their own judgments either for extrinsic fraud, under the rule first laid down in *U. S. v. Throckmorton,* 98 U.S. 61, or for either intrinsic or extrinsic fraud, as specified by Title 8 USCA, Sec. 738. See *Knauer v. U.S.,* 328 U.S. 654, 671, so holding as to intrinsic fraud despite the fact that, so construed, the statute is an apparent Congressional interference with the conclusiveness of final judgments entered in the exercise of judicial power which is lodged exclusively in our Federal Courts by Article III of the Constitution.

The judgment of the Court below set aside the California judgment on a purported finding of intrin-

sic fraud. However, there is nothing in the evidence that justifies the judgment of denaturalization. There is not the slightest evidence in the record that at the time of his naturalization in 1934 the appellant retained even a spark of allegiance to Germany. His activities and expressions since that time have not been incompatible with allegiance to the United States. An examination of the whole of the record reveals that the denaturalization judgment was based upon a belief that allowable facts and expressions of a harmless character long since his naturalization might impute such a mental reservation of foreign allegiance as at the time of naturalization. The judgment is erroneous for being contrary to the evidence and for being in violation of the "clear, unequivocal and convincing" evidence rule which, since the entry of the judgment below, has been clarified by the Supreme Court.

In *Schneidermann v. U. S.,* 320 U.S. 118, at 125, which was decided on June 21, 1943, the Supreme Court declared that in denaturalization cases the burden of proof rested upon the government to establish fraud or deceit in the procurement of naturalization by "Clear, unequivocal and convincing" evidence. See also the recent case of *Klapprott v. U.S.* (Jan. 17, 1949), 69 S. Ct. 384, 389, discussing that rule.

The judgment of the Court below in the instant case was entered on March 31, 1944, prior to the time the Supreme Court decided *Baumgartner v. U. S.,* 322 U.S. 655, on June 12, 1944, which clarified the law pertaining to the denaturalization cases, brought a rather abrupt halt to pending denaturalization cases

and is controlling on the evidentiary issues herein. At page 678 of its opinion that Court stated:

> "But where the claim of 'illegality' really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated."

In *Knauer v. U. S.,* 328 U.S. 654, 659, 660, decided on June 10, 1946, that Court stated:

> "The fundamental question is whether the new citizen still takes his orders from, or owes his allegiance to, a foreign chancellery. Far more is required to establish that fact than a showing that social and cultural ties remain. And even political utterances, which might be some evidence of a false oath if they clustered around the date of naturalization, are more and more unreliable as evidence of the perjurious falsity of the oath the further they are removed from the date of naturalization."

In *U. S. v. Kusche* (DC Cal. June 13, 1944), 56 F. S. 201, which was followed by *U. S. v. Korner* (DC Cal. June 13, 1944), 56 F. S. 242, U. S. District Judge Pierson Hall dismissed twenty-six (26) suits similar to those in the like consolidated suits in the

Court below. The Attorney General did not appeal from those decisions.

Since the *Baumgartner* decision the following cases have been decided against the contentions of the Government in denaturalization cases on the authority of that decision, viz.:

U. S. v. Reinsche (CCA-9, March 12, 1945), 156 Fed. (2d) 678;

U. S. v. Hauck (CCA-2, April 2, 1946), 155 Fed. (2d) 141;

Scheurer v. U. S. (CCA-9, June 16, 1945), 150 Fed. (2d) 535;

Bergmann v. U. S. (CCA-9, June 24, 1944), 144 Fed. (2d) 34;

U. S. v. Sotzek (CCA-2, Aug. 15, 1944), 144 Fed. (2d) 567.

See also:

Jogwick v. U. S. (CCA-4, May 25, 1944), 142 Fed. (2d) 998.

We believe these decisions to be decisive on the evidentiary issues herein.

Any fair appraisal of the evidence herein demonstrates that the judgment of denaturalization was not supported by the evidence and that, on the contrary, the plaintiff failed to sustain its burden of proof of a mental reservation of foreign allegiance at the time of naturalization by "clear, unequivocal and convincing" evidence. Had the *Baumgartner* decision been handed down before the Court below rendered its judgment there is little doubt that the appellant would have prevailed in the proceeding below.

CONCLUSION.

For the foregoing reasons we urge that the judgment of the Court below be reversed.

Dated, San Francisco, California,
February 28, 1949.

Respectfully submitted,
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